IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.1561 OF 2004
WITH
WRIT PETITION NOS.2575, 1560, 2576, 1562 & 2766 OF 2004

W.P. 1561/04 :

Vinayak Shejwadkar. ...Petitioner.
Versus
Bombay Khadi & Village Industries Association. ...Respondent.

.....

Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Petitioners.
Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Respondent.

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W.P. 2575/04 :

Bombay Khadi & Vuillage Industries Association. ...Petitioner.
Versus
Vinayak Shejwadkar. ...Respondent.

.....

Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Petitioner.
Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Respondent.

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W.P. 1560/04 :

Gurunath N. Prabhu. ...Petitioner.
Versus
Bombay Khadi & Village Industries Association. ...Respondent.
.....
Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Petitioners.
Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Respondent.
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W.P. 2576/04 :

Bombay Khadi & Vuillage Industries Association. ...Petitioner.
Versus
Gurunath N. Prabhu. ...Respondent.
.....
Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Petitioner.
Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Respondent.
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W.P. 1562/04 :

Sham V. Khanvilkar. ...Petitioner.
Versus
Bombay Khadi & Village Industries Association. ...Respondent.
.....
Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Petitioners.
Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Respondent.
.....
W.P. 2766/04 :

Bombay Khadi & Vuillage Industries Association. ...Petitioner.
Versus

Sham V. Khanvilkar. ...Respondent.

.....

Mr. P. K. Rele, Senior Advocate with Mr. Tayde and Mr. R. P. Rele i/b. Mr.Piyush Shah for the Petitioner.
Mr. C. U. Singh, Senior Advocate with Ms. Melanie D'Souza, Mr. Mahesh Londhe and Ms. Neha Singh i/b. Sanjay Udeshi & Co. for the Respondent.

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CORAM : DR. D.Y. CHANDRACHUD, J.

September 28, 2006.

ORAL JUDGMENT :

This batch of six Writ Petitions under Article 226 of the Constitution of India arises out of orders passed by the Industrial Tribunal by which approval was granted under Section 33(2)(b) of the Industrial Disputes Act, 1947 to the dismissal of three workmen. The action of the employer was preceded by two chargesheets dated 26th October 1987 and 28th April 1988 by which disciplinary proceedings were convened. During the pendency of the disciplinary proceedings, a third incident took place on 15th April 1989 involving, according to the employer, the chargesheeted workman in acts of violence on the premises of the establishment. An order of dismissal was passed by the employer on 24th April 1989 by which while recording the antecedent events, the employer reserved the right to

lead evidence in support of the allegations of misconduct before the Tribunal. The workmen have challenged the order of the Industrial Tribunal granting approval under Section 33(2)(b). The employer has in a corresponding batch of three petitions, challenged the order of the Tribunal, in so far as the Tribunal declined to consider the evidence relied on behalf of the employer to sustain the charge in relation to the incident which took place on 15th April 1989. The Tribunal held that in so far as the last incident was concerned, since no formal chargesheet was issued by the employer, the evidence that was led in support of the charge of misconduct before the Tribunal could not be considered. The Tribunal has, however, granted the application for approval on the basis that the misconduct with reference to the two chargesheets that were issued stands established on the evidence that was adduced before the Tribunal.

2. Counsel appearing on behalf of the employer and the workmen have agreed in stating before the Court that the facts relating to the cases of three workmen are similar and that accordingly, Writ Petition 1561 of 2004 filed by the workman and Writ

Petition 2575 of 2004 filed by the management have been argued as the lead petitions. Counsel are agreed in stating before the Court that the outcome of those Writ Petitions would govern the other petitions as well.

3. Vinayak Shejwadkar, the Petitioner before the Court in Writ Petition 1561 of 2004 was appointed by the Khadi and Village Industries Association as a Salesman-cum-Clerk on 2nd April 1974. On 26th October 1987, a chargesheet was issued to the workman together with two other co-workmen (who are the Petitioners before the Court in this batch) alleging that these workmen had instigated the employees to participate in an illegal strike which took place on 24th October 1987. A second chargesheet was issued on 28th April 1988. The subject matter of the chargesheet related to an incident of assault which is alleged to have taken place on 18th February 1988. The chargesheet noted that initially on 22nd October 1987, the three workmen had abused and insulted the Honorary Secretary. On 24th October 1987, the workmen had proceeded on a strike at the instigation of the three workmen and an enquiry was in progress. The

management declared a lockout with effect from 18th December 1987. In order to attend to urgent business, a temporary office was opened at the residence of the Vice Chairman at Goregaon. On 18th February 1988 when the Vice Chairman and Chief Executive Officer, after attending the office, had to leave to attend to routine office work, a group of 35 workers led by the three workmen entered the office and by identifying by certain specified employees directed the co-workers to start assaulting them. Several employees were assaulted in the course of the incident. Thereafter, the furniture, equipment and other material in the office were destroyed and the registers and files were forcibly taken away. A group of lady workers who were stated to have been instigated to go to the residence of one of the office bearers on the First Floor, not finding him there, are alleged to have abused the family members. The Police were stated to have been called and photographs were stated to have been taken of the damage that had been caused. It is alleged that the conduct of the chargesheeted workers was in breach of the order of the Industrial Tribunal dated 11th November 1987. The workmen were accordingly chargesheeted inter alia for going on an illegal strike, commission of

an act subversive of discipline, riotous and disorderly behaviour on the premises of the establishment, willful damage to the property of the establishment and of assault.

4. A disciplinary enquiry in respect of the first two chargesheets commenced. On 25th April 1989, the management passed an order of dismissal founded on the incident which took place on 15th April 1989. On that day, it is alleged, certain employees had come to the emporium to meet the Honorary Secretary. The three workmen along with another colleague, Ashok Waingankar, and others are alleged to have entered the room of the Chief Executive Officer and forced the Deputy Director to leave. It is alleged that several workmen, including one Shri Surendra Khichadia were severely assaulted as a result of which, the latter suffered a bleeding injury. The Police at the Azad Maidan Police Station were informed. Shri Surendra Khichadia was, according to the order, taken by the Police for hospitalization. The aforesaid act was, according to the employer, grave and serious, in that, despite the workmen having been suspended pending an enquiry into the first two chargesheets,

they disrupted the normal activities of the business of the employer. The employer stated that it was satisfied that their continuance in the employment was not in the interest of the Khadi and Village Industries Association; and no purpose would be served in pursuing the disciplinary enquiry on the ground that the workmen were not cooperating. In these circumstances, considering the gravity of the misconduct, the misconduct referred to in the chargesheets, and the previous record, the workmen were informed that they were dismissed with immediate effect. The employer, however, held that while no domestic enquiry had been held, it would lead necessary evidence to prove the acts of misconduct in an application for approval under Section 33(2)(b) of the Industrial Disputes Act, 1947 which was being filed. A Demand Draft towards one month's wages was paid over to the workmen.

5. Evidence was recorded in the course of the proceedings arising out of the application for approval. The Industrial Tribunal has passed separate orders allowing the applications for approval in the case of the three workmen who are before the Court in these

proceedings. Before the Industrial Tribunal, the management led the evidence of Shri Surendra Khichadia, Shri Ramniklal Bhuta, Shri Damodhardas Bhuta, Shri Kantilal K. Shah and Shri Navneet Panchal in support of the allegations of misconduct. The workman, Vinayak Shejwadkar, deposed. The Tribunal came to the conclusion that there was sufficient evidence to prove the alleged misconduct in respect of the earlier two incidents dated 22nd October 1987 and 18th February 1988. From the evidence led on behalf of the management, the Tribunal held that each of the three workmen has been duly identified as having participated *inter alia* in an illegal act of assault on the employees of the establishment. However, the Tribunal was of the view that in so far as the incident which took place on 15th April 1989 was concerned, since no chargesheet had been issued by the employer, the evidence in support of the allegation of misconduct in respect of that incident could not be taken into consideration. Nonetheless the Tribunal held that the application for approval was liable to be allowed on the basis that the allegation of misconduct in the first two chargesheets was duly proved on evidence.

6. In assailing the correctness of the order passed by the Industrial Tribunal, Counsel appearing on behalf of the workmen submitted that (i) The Model Standing Orders require the holding of a disciplinary enquiry and since no enquiry was held, the mandatory provisions of Section 33(2)(b) were violated and the action was null and void; (ii) Once the consequence of a breach of the requirements of Section 33(2)(b) is that the order of dismissal is null and void, it is not open to the employer when no enquiry is held to sustain the charge of misconduct by leading evidence before the Industrial Tribunal; (iii) The Tribunal was correct in holding that the employer could not have led evidence to prove the incident which took place on 15th April 1989 for want of a chargesheet in respect of that incident; (iv) The conclusions arrived at by the Tribunal were only prima facie conclusions and evidence having been led by the employer to sustain the charge, the Tribunal should have considered whether the misconduct was proved; and (v) The case of the workmen that they were victimised was not considered by the Tribunal.

7. On the other hand, on behalf of the employer it has been

submitted that (i) The Tribunal has held that the charge of misconduct contained in the two chargesheets was duly established on the basis of the evidence that was adduced before the Tribunal by the employer; (ii) There was absolutely no worthwhile evidence on the part of the workmen to counter the evidence that was adduced on behalf of the employer; (iii) The Tribunal having entered a finding of fact, this Court in the exercise of the jurisdiction under Article 226 of the Constitution of India should not interfere, particularly since the grant of the application for approval under Section 33(2)(b) does not preclude the workmen from raising an industrial dispute; (iv) The Supreme Court has held that a case where no enquiry has been held stands on the same footing as one where an enquiry is found to be defective and in both the cases, it is open to the employer to sustain the charge of misconduct before the Industrial Tribunal; (v) This position is not altered by Section 33(2)(b) and the judgment of the Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma,**[1] which dealt with the mandatory nature of the proviso to Section 33(2)(b) does not alter the position; (vi) The Tribunal was in error in not considering the evidence that was

1 AIR 2002 SC 643

adduced by the employer in support of the chargesheet dated 15th April 1989; the workman was clearly made aware by the order of dismissal of the nature of the allegation and the charges that were levelled. These submissions would now warrant consideration.

8. The Tribunal has allowed the application for approval under Section 33(2)(b). The Tribunal found that there was compliance with the conditions of the proviso to Section 33(2)(b) by the employer paying one month's wages and moving an application for approval. This position and the finding of the Tribunal is not disputed before the Court. Whether the Tribunal was justified in declining to consider the evidence in support of the allegation of misconduct relating to the incidents that took place on 15th April 1989 will be considered separately. The Tribunal held that the incidents of 24th October 1987 and 18th February 1988 were established and the evidence was sufficient to hold that the misconduct was established. The Tribunal has considered in great details the evidence of all witnesses who deposed on behalf of the employer. Amongst them was the evidence of Surendra Khichadia who was a victim of the incident of assault. A

perusal of the evidence that was brought on the record would show that the incident of assault of 18th February 1988 was established. The Tribunal had before it, the evidence of eye witnesses who specifically identified the workmen who participated in the incident. The Tribunal has evaluated the evidence of the witnesses who have deposed on behalf of the management. The evaluation of the evidence shows that the evidence of one of the witnesses, Navneet Panchal, was discarded by the Tribunal. There was, however, adequate evidence in the form of the deposition of Shri Kantilal Shah, who deposed in regard to the incident which took place on 18th February 1988. The nature of the incident that took place on 18th February 1988 would reveal that the charge of misconduct was of a serious nature and character. The finding that has been arrived at by the Tribunal on consideration of the evidence cannot be regarded as perverse so as to warrant the interference of this Court under Article 226 of the Constitution. Significantly, the only evidence that was offered on the part of the chargesheeted workman, Vinayak Shejwadkar, was to the following effect:

> "1. I had joined the association on the post of Salesman on 2-4-1974. I deny the charges in charge sheet

> dated 26-10-87 and 28-4-1988. Enquiry had taken place but it was not completed. It is not informed why the enquiry could not be completed. The association had sent me a cheque. I did not accept the cheque. They had not sent me any notice. I was active member of the Union. I pray that application be dismissed."

Undoubtedly the burden of establishing the misconduct lay on the employer. The employer having discharged the burden of establishing the misconduct, the failure of the workmen to offer cogent evidence in regard to the allegation of misconduct is an important circumstance which must be taken into consideration by this Court. In my view, this Court would not be justified in reappreciating the evidence and in substituting its own conclusion for the conclusion that has been arrived at by the Tribunal as a fact finding body.

9. On behalf of the workmen, however, it is urged that no enquiry having been held in accordance with the Model Standing Orders, the Industrial Tribunal in an application under Section 33(2)(b) had no jurisdiction to permit the employer to lead evidence to sustain the charge of misconduct. In considering the merits of this submission, it must be noted that it is a settled principle of law that a

case where no enquiry is held is regarded as standing on the same footing as a case where the enquiry is found to be defective. In both cases, having regard to the principles of law laid down by the Supreme Court in **The Workmen of M/s.Firestone Tyre & Rubber Co. of India (Pvt.) Ltd. vs. Management**,[2] the management is entitled to seek an opportunity before the Industrial Tribunal to adduce evidence in support of the allegation of misconduct. In **Firestone**, the Supreme Court held that this right which was always recognised as existing in the employer has not been taken away by Section 11A of the Industrial Disputes Act, 1947. Counsel appearing on behalf of the Workmen submits that until the judgment of the Supreme Court in **Jaipur Zila** (supra), there can be no dispute about the principle that an employer who had held no enquiry at all, like an employer whose enquiry had been held to be defective, would be entitled to lead evidence in support of the charge of misconduct and the entitlement of the employer to do so would exist both in a reference under Section 10 as well as in an approval application under Section 33(2)(b) of the Industrial Disputes Act, 1947. However, it was urged that the position should be regarded as having been altered consequent upon the

2 1973(1) LLJ 278

judgment of the Supreme Court in **Jaipur Zila**.

10. This submission of the employer cannot be accepted for more than one reason. The issue which arose before the Supreme Court in **Jaipur Zilla** was formulated in the judgment of the Constitution Bench thus:

> "If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947 whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33 (2)(b) would not render the order of dismissal inoperative?"

The Supreme Court held that the proviso to Section 33(2)(b) was mandatory. A breach of Section 33 invited punishment under Section 31 and compliance with the provisions contained in the proviso had to be duly satisfied if an order passed under Section 33(2)(b) was to be effective. In para 13 of the judgment, the Supreme Court held thus:

> "The proviso to Section 33(2)(b) as can be seen from its very unambiguous and clear language is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under S.31(1) with

imprisonment for a term which may extent to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the

> requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workmen." (emphasis supplied).

The objective of the proviso to Section 33(2)(b) is to protect a workman against victimization and unfair labour practices by the employer during the pendency of an industrial dispute. The requirement that the approval application should be moved before the Tribunal is intended to ensure that the discharge or dismissal of the workman is not a pretense that is resorted to by the employer as a measure of victimization. Similarly, the provision for the payment of one month's wages which is an intrinsic part of the proviso is of a mandatory character. The Supreme Court has held that an order passed dismissing or discharging the workmen may bring an end to the relationship of employer and employee but where Section 33(2)(b) applies, the order remains incomplete and inchoate as it is subject to the approval of the authority under the said provision. If an approval is not given, nothing further needs to be done by the employee as it is as if the order of discharge or dismissal was never passed. The Supreme Court, therefore, held that there was no need

for a specific or separate order for reinstatement. On the other hand, if the approval is granted by the authority, the employee should he be aggrieved can make a complaint under Section 33A.

11. The judgment of the Supreme Court in **Jaipur Zilla**, therefore, is a clear authority for the proposition that compliance with the proviso to Section 33(2)(b) is mandatory and action in breach of the conditions contained therein would render the order of discharge or dismissal null and void. In **Jaipur Zila**, the question as to whether an employer whose enquiry is held to be defective or, in a case where no enquiry has been held, is entitled to sustain the charge of misconduct by leading evidence before the Industrial Tribunal was not under consideration. That issue was settled by a line of precedent and reiterated in the judgment of the **Firestone**. The decision in **Jaipur Zila** does not overrule the judgment in **Firestone** and the judgment in **Firestone** continues to hold the field. The submission of Counsel appearing on behalf of the Petitioner that an employer who has held no enquiry cannot be permitted to be allowed to lead evidence in support of the charge of misconduct in the approval

application under Section 33(2)(b) will give rise to anomalous results. A case where no enquiry is held stands on the same footing as a case where an enquiry is defective. An employer whose enquiry has been held to be defective, being entitled to lead evidence in support of misconduct, the same provisions must govern a case where no enquiry has been held at all. The first part of Section 33(2)(b) permits the employer during the pendency of proceedings in respect of an industrial dispute inter alia to alter the conditions of service in regard to any matter not connected with the dispute or to discharge or punish a workman for any misconduct not connected with the dispute. By the enabling provision, the employer is permitted to do so in accordance with Standing Orders applicable to the workmen concerned, or when there are no Standing Orders, in accordance with the terms of the contract. The requirement in the Standing Orders that an employer must issue a chargesheet and hold a disciplinary enquiry has never been regarded as foreclosing the right of the employer to sustain the misconduct if an enquiry is not held or if it is found to be defective. Before the Supreme Court in **Firestone,** it was in fact urged that the Court had not in its previous decisions considered a breach or

illegality committed by the employer in not holding a domestic enquiry. The submission was that the employer is obliged to conduct a proper domestic enquiry in accordance with the Standing Orders before passing an order of discharge or dismissal and an order without such an enquiry was illegal. It was contended that the effect of an illegal order such as this was to deprive the employer of an opportunity to lead evidence for the first time before the Tribunal. This submission was specifically rejected by the Supreme Court with the following observations:

> "It is no doubt true that standing orders, which have been certified under the Industrial Employment (Standing Orders) Act, 1946, become part of the statutory terms and conditions between the industrial employer and his employee and that they govern the relationship between the parties. But there is no provision either in this statute or in the Act which states that an order of dismissal or discharge is illegal if it is not preceded by a proper and valid domestic enquiry. No doubt it has been emphasised in the various decisions of this Court that an employer is expected to hold a proper enquiry before dismissing or discharging a workman. If that requirement is satisfied, an employer will by and large escape the attack that he has acted arbitrarily or mala fide or by way of victimisation. If he has held a proper enquiry, normally his bona fides will be established. But it is not correct to say that this Court, when it laid down that an employer has a right to adduce evidence for the first time before the Tribunal, was not aware of a breach committed by an employer of the provisions of the standing orders. A similar contention, though in different form,

> advanced on behalf of the workmen was rejected by this Court in Workmen of Motipur Sugar Factory (Private) Limited (supra). It was specifically contended before this Court by the workmen therein that when an employer had held no enquiry, as required by the standing orders, it was not open to him to adduce evidence before the Tribunal for the first time and justify the order of discharge. This contention was rejected by this Court and it was held that if the enquiry was defective or no enquiry had been held, as required by the standing orders, the entire case would be open before the Tribunal and the employer would have to justify on evidence as well that its order of dismissal or discharge was proper. Therefore, this contention cannot be accepted."

The Supreme Court also held thus:

> "An application made by an employer under S.33(1) for permission or S.33(2) for approval has still to be dealt with according to the principles laid down by this Court it its various decisions. No change has been effected in that section by the Amendment Act. It has been held by this Court that even in cases where no enquiry has been held by an employer before passing an order of dismissal or discharge, it is open to him to adduce evidence for the first time before the Tribunal. Though the Tribunal is exercising only a very limited jurisdiction under this section, nevertheless, it would have applied its mind before giving permission or approval. Section 33 only imposes a ban. An order of dismissal or discharge passed even with the permission or approval of the Tribunal can form the subject of dispute and as such referred for adjudication. Quite naturally, when the dispute is being adjudicated, the employer will rely upon the proceedings that were already held before a Tribunal under S.33. They will form part of the materials on record before the Tribunal. The contention

> of Mr.Deshmukh that if no enquiry is held, the order of dismissal will have to be set aside, if accepted, will lead to very incongruous results. The Tribunal would have allowed an employer to adduce evidence before it in proceedings under S.33 for the first time, even though no domestic enquiry had been held. It is held that another Tribunal, which adjudicates the main dispute, has to ignore those proceedings and straightaway order reinstatement on the ground that no domestic enquiry had been held by an employer, it will lead to very startling results."

12. In these circumstances, the decision of the **Jaipur Zila** does not alter the position which has held the field prior to and after the judgment in **Firestone** in regard to the entitlement of the employer to substantiate the charge of misconduct by leading evidence before the Industrial Tribunal.

13. On behalf of the workmen it has been submitted that once the employer had exercised his right to lead evidence in support of the charge of misconduct, it was for the Tribunal to assess as to whether the misconduct stood established. In the present case, it is submitted that the Tribunal by using the expression that the misconduct was prima facie established has abdicated that jurisdiction. There is no merit in the submission. Now, it is a settled

principle of law that the jurisdiction which is exercised by the Industrial Tribunal in granting its permission under Section 33(1) or approval under Section 33(2) is a limited jurisdiction. In **Lalla Ram vs. Management of D. C. M. Chemical Works Ltd.**,[3] the Supreme Court formulated the principle thus:

> "In proceedings under S. 33(2)(b) of the Act, the jurisdiction of Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court in Bengal Bhatdee Coal Co. v. Ram Probesh Singh, (1964) 1 SCR 709; (AIR 1964 SC 486); Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar (1961) 1 Lab LJ 511)(SC); Hind Construction & Engineering Co. Ltd. v. Their Workmen, (1965) 2 SCR 83 : AIR 1965 SC 917; Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. V. management, (1973) 3 SCR 587 : AIR 1973 SC 1227, and eastern Electric and Trading Co. v. Baldev Lal, 1975 Lab IC 1435 : (AIR 1975 SC 1892) that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly

3 AIR 1978 SC 1004

> disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

The Supreme Court held that if, however, a domestic enquiry suffers from defects or infirmity, the authority will have to find out on its own assessment of the evidence adduced whether there was justification for dismissal. In the present case, there is no manner of doubt that the Tribunal has duly exercised its jurisdiction as required under Section 33(2)(b). The Tribunal has adverted to all the evidence which was marshalled before it and in its conclusion, observed thus in regard to the incidents which form the subject matter of the chargesheets dated 26th October 1987 and 28th April 1988:

> "After taking stock of entire evidence on record, I find that there is sufficient evidence led by the applicant to prove the alleged misconduct of the concerned employees in respect of the earlier two incidents i.e. incident dated 22-10-1987 and 18-2-1988."

In the face of this finding of the Tribunal, the mere use of the words "prima facie" in certain parts of the order cannot be regarded as an

expression of only a tentative opinion by the Tribunal on the merits of the case. The Tribunal has gone into the merits in some amount of detail. The finding is that there is evidence in support of the misconduct. The stray use of the expression “prima facie” by the Tribunal can only be construed to mean that the determination by the Tribunal would not operate to conclude the dispute between the parties, should an industrial dispute be raised or a complaint under Section 33 be filed. The workman is entitled to raise a dispute even after an application for approval is granted. The observation of the Tribunal must, therefore, be considered in that context.

14. The next submission that is urged on behalf of the workmen was that the Tribunal has declined to consider the allegation of victimization. There is absolutely no merit in the submission. It is well settled that an allegation of victimization has to be established on the basis of cogent evidence. The evidence of Vinayak Shejwadkar has already been discussed in the earlier part of the judgment. There is absolutely no evidence at all in support of the plea of victimization.

15. That leads the Court to the last and final question, namely, whether the Tribunal was justified in discarding the evidence that was led by the employer in support of the incident which took place on 15th April 1989. The Tribunal declined to consider the evidence adduced on behalf of the employer, holding that since no chargesheet has been issued by the employer, the evidence was liable to be discarded. In holding thus, the Tribunal purported to rely on a judgment of a Learned Single Judge of this Court in **Theatre Employees Union v. S. V. Kotnis**.[4] In the aforesaid case, the employer who owned a Cinema Theatre visited the Theatre and noticed that the auditorium was full though all the tickets were not sold. Certain statements of the employees were recorded. The employer thereupon served a notice of termination on five employees, terminating their services on the grounds of loss of confidence. The Learned Single Judge held that the employer was right in his submission that there could be no dismissal from service without a show cause notice or an enquiry. The Labour Court was held to be in error in permitting the employer to lead evidence in support of the allegation of misconduct of employees even when admittedly they

4 1992 (1) CLR 474

were never served with a chargesheet nor was an enquiry held. These observations of the Learned Single Judge, read out of context, would clearly be contrary to the law laid down by the Supreme Court in **Firestone** and the line of authorities both prior and subsequent thereto. A defective enquiry stands on the same footing as a case where an enquiry is held and in both cases, the employer is entitled to lead evidence to sustain the charge before the Tribunal. The observations of the Learned Single Judge, however, must be construed in the context of a situation where an order of termination was issued on grounds of 'loss of confidence', where the employee was not placed on notice in regard to the nature of the misconduct. The next judgment upon which reliance was placed by the workmen is a judgment of a Learned Single Judge in **Wai Taluka Sahakari Kharedi Vikri Sangh Ltd. vs. Bajirao Mahadeo Mahadik.**[5] That was a case where the services of a workman were terminated in pursuance of a resolution passed by the employer on the ground that the work was unsatisfactory and the Society did not need his services. There was no precise charge at all and the chargesheet came to be framed at the instance of the employer by the Labour Court. It is in

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this context that the Learned Single Judge held that if there was a chargesheet in existence with respect to which a defective enquiry had been held, then the liberty to satisfy the Tribunal upon material in support of the charge could be exercised. The Court held that it was no function of the adjudicating Tribunal to frame the charges suo motu or at the instance of the employer. In contrast, in the present case, the order of dismissal that was served on the workmen on 25th April 1989 specifically adverts, in a considerable degree of detail, to the misconduct which is alleged to have taken place on 15th April 1989. The names of the employees who were assaulted, the names of persons in whose presence the assault took place and the nature of the incident have all been referred to in the order of dismissal. The workmen were also placed on notice that considering the gravity of the charge and the situation of the establishment, no domestic enquiry was being held but that the charge would be sustained by leading evidence in an approval application under Section 33(2)(b). The workmen, therefore, had adequate notice of the nature of the allegation and of the case which was sought to be established against them by the employer. The Tribunal was, in these circumstances,

patently in error in declining to consider the evidence led by the employer in support of the incident that took place on 15th April 1989.

16. Now, in so far as the evidence that was led by the employer was concerned, the incident which took place on 15th April 1989 was established through the evidence of Surendra Khichadia who was injured in the course of the incident. The witness deposed to the nature of the incident and identified the workmen as being involved in the incident. Shri Kantilal Shah who was a member of the Board also deposed to the incident that had taken place and furnished the names of the workers who were involved. The evidence of these two witnesses was, in my view, adequate to sustain the charge of misconduct with reference to the incident. However, it is necessary to clarify that by the view which I have formed, I have come to the conclusion that the Tribunal was, independent of the incident of 15th April 1989, justified in granting its approval to the dismissal of the workmen on the basis of the incident which formed the subject matter of the chargesheets dated 26th October 1987 and 28th April 1988.

17. For all these reasons, I am of the view that Writ Petition 1561 of 2004 filed by the workmen will have to be dismissed. The Petition is accordingly dismissed. Writ Petition 2575 of 2004 filed by the management is allowed in terms of prayer clause (a). There shall be no order as to costs.

Writ Petition 1560 and Writ Petition 2576 of 2004:

18. For the reasons already indicated, the petition filed by the workman (W.P. 1560 of 2004) would stand dismissed. The petition filed by the management (W.P. 2576 of 2004) is made absolute in terms of prayer clause (a).

Writ Petition 1562 and Writ Petition 2766/04:

19. For the reasons already indicated, the petition filed by the workman (W.P. 1562 of 2004) would stand dismissed. The petition filed by the management (W.P. 2766 of 2004) is made absolute in terms of prayer clause (a).

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